A

JOHN UNTIL & ORS v. PROLIFIC YIELD SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[SUIT NO: SDK-23NCvC-1-5-2021]
12 MARCH 2024

B

Abstract – *In an action for negligence and public nuisance on allegations of pollution by unlawfully releasing or discharging industrial effluents into a river, the claimants cannot solely rely on previous convictions under the Environmental Quality Act 1974; they have to bring independent evidence to support their claims. Causation, being an element to prove in a claim for negligence, ought to be made out. However, if a suspension notice has been issued to a specific mill as a result of an investigation, and that mill is found to have breached the conditions of their licence, and their licence suspended, then on a balance of probabilities, a claim for negligence and public nuisance can be established against the said mill.*

C

D

E

TORT: *Negligence – Public nuisance – Unlawfully or wrongfully releasing or discharging industrial effluents or substance into river and its tributaries – Whether pollution caused by defendants – Whether defendants' mills were the only mills located near affected river – Whether causation, being an element to prove in claim for negligence, made out – Whether suspension notice issued – Whether plaintiffs established their claim on balance of probabilities – Quantum of damages – Whether established*

F

CIVIL PROCEDURE: *Action – Representative action – Locus standi – Preliminary objection raised – Whether plaintiffs and those represented by them members of a class, had common interest and common grievances – Whether absence of exact identity of claimants an impediment to plaintiffs commencing representative action – Whether plaintiffs provided list of claimants – Whether plaintiffs had locus standi to commence action*

G

This suit was a representative action commenced by the plaintiffs against the first and second defendants for negligence and public nuisance. The plaintiffs were residents of Kampung Segaliud, Sandakan and sued for and on behalf

H

of themselves and the residents in that village. Their main complaint was that the first and second defendants, whose oil palm mills were located in the vicinity of Sungai Segaliud, allegedly had unlawfully and/or wrongfully released and/or discharged or caused to be released or discharged industrial effluents and/or other effluents or substance into Sungai Segaliud and/or its

I

tributaries. The plaintiffs claimed that the first defendant had unlawfully discharged or caused to discharge industrial effluent into Sungai Segaliud

and/or its tributaries in February 2019 and had been doing so 'numerous times' and been charged, convicted and sentenced for those acts. As for the second defendant, the plaintiffs claimed that they had caused an unlawful discharge of their industrial effluent into Sungai Segaliud on or about 26 September 2019 and on 'numerous times.' The plaintiffs had lodged a police report and a complaint with the Department of Environment ('DOE') on the alleged pollution. The investigation from the DOE found the second defendant to have not complied with the conditions of their licence on the discharge of the industrial effluent. The plaintiffs claimed that the discharge of the industrial effluent into Sungai Segaliud affected the livelihood of the plaintiffs and the residents of Kampung Segaliud who were dependent on the river and/or its tributaries for their source of water, food, income and survival. The first defendant asserted that they had, at all material times, set up and operated a safe and adequate industrial effluent treatment system which had been duly approved and licensed by the relevant authorities and in compliance with the said license and all relevant laws and regulations. The first defendant denied that they had caused any discharge of either treated or untreated industrial effluent from their land or mill into Sungai Segaliud and/or its tributaries. While the first defendant admitted having been charged and convicted on 5 February 2020 for two charges in respect of high content of Biochemical Oxygen Demand ('BOD') and suspended solids in breach of their license, they said that these charges did not relate to any of the alleged discharge of industrial effluent into Sungai Segaliud and/or its tributaries as alleged by the plaintiffs. As for the second defendant, they stated that they had, at all material times, taken steps to ensure that the operation of their mill complied with the relevant laws, regulations and practice and that this included the management of their palm oil mill effluent ('POME'). They denied that they had caused or omitted any act which had caused the acts complained of by the plaintiffs and said that the plaintiffs had failed to establish that the alleged pollution was caused by their mill. Additionally, it was contended that there was no evidence led by the plaintiffs to establish the alleged damages they suffered. The second defendant had also raised a preliminary objection and challenged the *locus standi* of the plaintiffs to commence this action.

Held (ordering accordingly):

(1) The plaintiffs and those represented by them were undoubtedly members of a class and they had a common interest. The plaintiffs and those represented had a common grievance. The reliefs sought were in its nature beneficial to all of them. The intitulement clearly stated that the plaintiffs were 'suing for and on behalf of themselves and the residents of Kampung Segaliud, Sandakan'. It was also pleaded in the amended statement of claim that the plaintiffs were bringing the action for and on behalf of those stated in the list of claimants annexed to it.

Even if the exact identity of the claimants whom the plaintiffs were representing were absent, it was not an impediment to the plaintiffs commencing the representative action (*Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors*). Here, the plaintiffs had gone further and provided the list of claimants which included the names and identification card numbers of 144 claimants. (paras 11-13)

(2) The plaintiffs could not rely solely on the first defendant's previous convictions under the Environmental Quality Act 1974 ('Act') – they had to bring independent evidence to support their claims for negligence and public nuisance. Notwithstanding that there was evidence that the Long Tawie River had been polluted as reported in the local newspaper, there was in fact no evidence from the plaintiffs that the said pollution was caused by the first defendant. Even if the plaintiffs had discharged their burden by the evidence that there was pollution caused in February 2019, the first defendant had shifted the evidential burden back to the plaintiffs when it was led in evidence that the first and second defendants were in fact not the only mills located nearby Sungai Segaliud and its tributaries. (paras 40-42)

(3) The plaintiffs' reliance on the fact that the first defendant had breached its license conditions and was charged did not *ipso facto* prove that they were the ones who had caused the river to be in the condition that it was on 11 February 2019. In other words, causation, being an element to prove in a claim for negligence, was not made out. For the same reason, the plaintiff's reliance on DW1's admission that the terms and conditions of the first defendant's licence were meant to avoid pollution to the environment including rivers and if the terms and conditions of license were breached, there was a high possibility that the environment especially rivers could be polluted, was not evidence that the first defendant did cause the pollution. The breach of the conditions of the licence could not by itself and without more be evidence as the cause of the pollution. The plaintiffs have not established their case against the first defendant, be it for negligence and/or public nuisance, on a balance of probabilities. It was therefore dismissed. (paras 43-49)

(4) The DOE had conducted an investigation on all of the mills or sources of the pollution around the Sungai Segaliud basin. As a result of their investigation, the DOE found one mill which had breached the conditions of their licence and which licence was therefore suspended by the DOE. Evidence showed that the suspension notice was issued to the second defendant on 11 October 2019. There was evidence on a balance of probabilities to show that the second defendant had caused the pollution on 26 September 2019. (paras 59-61)

(5) Going by the breaches identified by the DOE in the suspension notice, it was clear that the DOE had found that the second defendant had failed to properly discharge its effluent discharge, causing overflows into the tributaries of Sungai Segaliud and eventually to Sungai Segaliud. In this regard, unlike the case against the first defendant, this court was of the view that notwithstanding that there was no sample taken of the water from Sungai Segaliud, the evidence was sufficient to require the second defendant to answer. The suspension notice clearly stated that the second defendant's failure to discharge the effluent property had caused the effluent to flow into the tributaries which then flowed into Sungai Segaliud. DW3 had testified that the river path from the second defendant's palm oil mill and land irrigation area to Sungai Kam Cheong started from an internal stream within the second defendant's palm oil mill. He further agreed that the internal stream would flow into Sungai Kam Cheong and that Sungai Kam Cheong would flow into Sungai Segaliud. The second defendant had failed to rebut the plaintiffs' evidence and hence, the plaintiffs had established their claim for negligence against the second defendant on a balance of probabilities. As regards the claim for public nuisance, the plaintiffs had also established their claim on a balance of probabilities. (paras 63-70)

(6) The plaintiffs bore the burden of establishing the quantum of damages. However, the plaintiffs merely testified that the destruction and pollution had severely affected the lives and livelihoods of the residents of Kampung Segaliud and that rivers were invaluable assets and treasures. There was no evidence as to the damages suffered by the plaintiffs. Notwithstanding the positive findings of this court on the issue of liability against the second defendant, there was nothing before this court to justify the claim for RM50 million and/or other sum for that matter. (paras 75 & 76)

Case(s) referred to:

Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor [2014] 6 CLJ 17 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin [2015] 7 CLJ 59 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Datuk S Nallakaruppan & Ors v. Datuk Seri Anwar Ibrahim & Other Appeals [2015] 6 CLJ 425 CA ***(refd)***
DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***
Hollington v. F Hewthorn & Co Ltd [1943] 2 All ER 35 ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors [1977] CLJU 68; [1977] 1 LNS 68 HC ***(refd)***
Ong Tua Chor v. Lee Beng Tong [1975] CLJU 116; [1975] 1 LNS 116 HC ***(refd)***
Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1986] CLJU 124; [1986] 1 LNS 124 HC ***(refd)***
Petronas Gas Bhd v. DWZ Industries (Johor) Sdn Bhd & Anor [2020] 2 CLJ 694 HC ***(refd)***

Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ Rep 635 HC ***(refd)***
Raja Abdullah Wahman Raja Sulaiman & Anor v. Nikseng Plantations Sdn Bhd & Ors And Niksian Holdings Sdn Bhd & Or [1994] 1 CLJ 287 HC ***(refd)***
Re Tong Tai Holdings Sdn Bhd [2003] 6 CLJ 170 HC ***(refd)***
Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793 CA ***(refd)***
She Eng Gek v. DA De Silva [1956] CLJU 113; [1956] 1 LNS 113 HC ***(refd)***
Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***
Voon Keng & Ors v. Sykt Muzwina Development Sdn Bhd [1990] 1 CLJ 1010; [1990] 3 CLJ (Rep) 329 HC ***(refd)***
YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 43
Government Proceedings Act 1956, s. 8(1)
Rules of Court 2012, O. 15 r. 12(3)

Other source(s) referred to:
Clark & Lindsell on Torts, 18th edn, London, Sweet & Maxwell, 2000, p 979

For the plaintiffs - Goldam Hamid; M/s Goldam & Co
For the 1st defendant - Roderic Fernandez & Wong Chik Kien; M/s Shelley Yap
For the 2nd defendant - Grace Chaw; M/s Grace Chaw & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] This suit was a representative action commenced by the named plaintiffs against the first and second defendants for negligence and public nuisance. The plaintiffs were residents of Kampung Segaliud, Sandakan and sued for and on behalf of themselves and the residents in that village.

[2] Their main complaint was that the first and second defendants, whose oil palm mills were located in the vicinity of Sungai Segaliud, allegedly had unlawfully and or wrongfully released and or discharged or caused to be released or discharged industrial effluents and or other effluents or substance into Sungai Segaliud and or its tributaries.

[3] After a full trial, this court ruled that the plaintiffs have failed to establish their case against the first defendant but found the second defendant liable.

[4] I now provide the full grounds for my said decision.

Preliminary Issue – The Plaintiffs Lacked *Locus Standi*?

[5] The second defendant had challenged the *locus standi* of the plaintiffs to commence this action. It was therefore appropriate that the court first dealt with this issue – see *Bumiputra-Commerce Bank Bhd v. Augusto Pompeo Romei & Anor* [2014] 6 CLJ 17; [2014] 3 MLJ 672 and *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793.

[6] It was contended for the second defendant that while the named plaintiffs had obtained a consent from the State Attorney-General pursuant to s. 8(1) of the Government Proceedings Act 1956, they did not have the authority to act on behalf of the 144 residents named in the list of claimants annexed to the amended statement of claim.

[7] In addition, it was also contended that the plaintiffs had failed to identify the claimants in accordance with O. 15 r. 12(3) of the Rules of Court 2012 citing the High Court cases of *Raja Abdullah Wahman Raja Sulaiman & Anor v. Nikseng Plantations Sdn Bhd & Ors And Niksian Holdings Sdn Bhd & Or* [1994] 1 CLJ 287 and *Re Tong Tai Holdings Sdn Bhd* [2003] 6 CLJ 170 as support.

[8] With respect, there was good authority for this court not to be persuaded by the contentions for the second defendant. Although not a unanimous decision on the merits of the case, the majority and the minority of the Justices of the Court of Appeal in *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 were on the same page as to the issue on representative action.

[9] Speaking for the majority, Abdul Malik Ishak JCA (as he then was) stated the following:

> [397] This was certainly a representative action in accordance with O. 15 r. 12 of the Rules of the High Court 1980 ("RHC") and it makes not a whit of a difference that none of the four plaintiffs testified in court. Lord Shand in *The Duke of Bedford v. Ellis And Other*s [1901] AC 1, at p. 14 explained the pith and depth of O. 15 r. 12 of the RHC in these erudite terms:
>
> > The rule has been framed and adopted for a useful and important object – the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have 'the same interest in one cause or matter', for in such cases 'one or more of such persons may sue on behalf or for the benefit of all persons so interested'.

[398] It is enough to justify a person suing in a representative action if he has a common interest with those whom he claims to represent. The sole test to apply is that of "the same interest" in one cause or matter. The pre-requisites for invoking O. 15 r. 12 of the RHC are:

(a) there must be numerous persons with the same common interest arising out of the same contract or the same grant or claim pertaining to the same subject matter;

(b) the reliefs sought by these numerous persons must not be personal but beneficial to the class as a whole; and

(c) the plaintiffs and those represented in it must be members of a class having a common interest and a common grievance and the reliefs sought are beneficial to all of them.

[399] It would be ideal to refer to *In re Braybrook, Braybrook v. Wright* [1916] WN 74; *Markt & Co Limited v. Knight Steamship Company, Limited, Sale & Frazar v. Knight Steamship Company, Limited* [1910] 2 KB 1021, CA, at p. 1040; *Eh Riyid v. Eh Tek* [1976] 1 LNS 25, FC; *Voon Keng & Ors v. Sykt Muzwina Development Sdn Bhd* [1990] 1 CLJ 1010; [1990] 3 CLJ (Rep) 329; *Mohd Latiff Shah Mohd & Ors v. Tengku Abdullah ibni Sultan Abu Bakar & Ors And Other Actions* [1995] 3 CLJ 77; and *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2003] 7 CLJ 205 in order to understand the ramifications of O. 15 r. 12 of the RHC in a better light.

[10] Zainun Ali JCA (as she then was) in her dissenting judgment, in a similar vein held as follows:

[222] As regards whether this suit is a representative action or otherwise, one needs to look no further than to O. 15 r. 12 the Rules of High Court 1980. It states:

> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

[223] It is trite that the three criteria to satisfy the rule are common interest, common grievance and that the relief sought must be beneficial to all (*Tong Tai Holding Sdn Bhd v. Jimi Mantali & Ors* [2003] 5 MLJ 450).

[224] Though the 1st defendant took the approach that the 213 sub-purchasers represented by the four (4) plaintiffs were at no time identified in the evidence either by name or the plot numbers they hold in the land, and that there were varying agreements (for sale of shares or for sale of land) thus there was no common interest, the learned trial judge found this contention to be unsustainable.

[225] The first defendant's further contention that the fact that 43 of the sub-purchasers had entered into agreements with the first defendant made it uncertain as to whether these 43 sub-purchasers came with the 213 plaintiffs.

[226] However the plaintiffs simple answer to all these issues is this. The identity of the 217 plaintiffs was made in a letter (P34) on whose behalf SP7 filed an earlier action and that in a representative action, the plaintiff need not identify each and every person he is representing. As was observed by Haidar J (as he then was) in *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 1 CLJ (Rep) 169:

> A plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent and the fact that there are two opposing factions within the Kayan community does not prevent this action from being a representative action.

[227] The learned trial judge took the position that the exact identity of the persons whom the four named plaintiffs are representing are not critical nor imperative. The absence of these is not an impediment to commencing a representative action so long as they are a class of persons with a common interest and a common grievance.

[228] The learned trial judge found that the said representative action of the plaintiff was properly constituted even if in the event of success, they would be entitled to different measures of relief. In fact the 213 unnamed plaintiffs represented by the four (4) named plaintiffs need not even give their consent, and are not liable to costs.

(See Sultan Azlan Shah (the FJ) in *Eh Riyid v. Eh Tek* [1976] 1 LNS 25).

[229] I agree with the above finding of the learned trial judge and again, found no reason to intervene.

[11] Here, the plaintiffs and those represented by them were undoubtedly members of a class and that they had a common interest. Secondly, the plaintiffs and those represented had a common grievance. Thirdly, the reliefs sought were in its nature beneficial to all of them – see *Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1986] CLJU 124; [1986] 1 LNS 124; [1988] 2 MLJ 624 and *Voon Keng & Ors v. Sykt Muzwina Development Sdn Bhd* [1990] 1 CLJ 1010; [1990] 3 CLJ (Rep) 329.

[12] The cases cited by the second defendant were distinguishable in that in the present case, the intitulement clearly stated that the plaintiffs were "suing for and on behalf of themselves and the residents of Kampung Segaliud, Sandakan". It was also pleaded in the amended statement of claim that the plaintiffs were bringing the action for and on behalf of those stated in the list of claimants annexed to it.

[13] Per the court's decision in *Vellasamy*'s case (*supra*), even if the exact identity of the claimants whom the plaintiffs were representing was absent, it was not an impediment to the plaintiffs commencing the representative action. Here, the plaintiffs had gone further and provided the list of claimants which included the names and identification card numbers of 144 claimants.

A **The Contentions Of The Parties In Brief**

The Plaintiffs'

[14] The plaintiffs claimed that the first defendant had unlawfully discharged or caused to discharge industrial effluent into Sungai Segaliud
B and/or its tributaries in February 2019 and had been doing so "numerous times" and been charged, convicted and sentenced for those acts.

[15] As for the second defendant, the plaintiffs claimed that they had caused an unlawful discharge of their industrial effluent into Sungai Segaliud on or about 26 September 2019 and on "numerous times".

C

[16] The plaintiffs had lodged a police report and a complaint with the Department of Environment ("DOE") on the alleged pollution. The investigation from the DOE found the second defendant to have not complied with the conditions of their licence on the discharge of the industrial effluent.

D

[17] The plaintiffs claimed that the discharge of the industrial effluent into Sungai Segaliud affected the livelihood of the plaintiffs and the residents of Kampung Segaliud who were dependent on the river and/or its tributaries for their source of water, food, income and survival.

E *The First Defendant's*

[18] The first defendant asserted that they had, at all material times, set up and operated a safe and adequate industrial effluent treatment system which had been duly approved and licensed by the relevant authorities and in compliance with the said license and all relevant laws and regulations.

F

[19] The first defendant denied that they had caused any discharge of either treated or untreated industrial effluent from their land or mill into Sungai Segaliud and/or its tributaries. They further claimed that in any event, the topography of their land/mill was such that industrial effluent would not flow into Sungai Segaliud and/or its tributaries.

G

[20] While the first defendant admitted having been charged and convicted of their own guilty plea on 5 February 2020 before the Sessions Court for two charges in respect of a high content of Biochemical Oxygen Demand ("BOD") and Suspended Solids in breach of their licence, they said that these
H charges did not relate to any of the alleged discharge of industrial effluent into Sungai Segaliud and/or its tributaries as alleged by the plaintiffs.

The Second Defendant's

[21] The second defendant stated that they had, at all material times, taken
I steps to ensure that the operation of their mill complied with the relevant laws, regulations and practice and that this included the management of their palm oil mill effluent ("POME").

[22] They denied that they had caused or omitted any act which had caused the acts complained of by the plaintiffs and said that the plaintiffs had failed to establish that the alleged pollution was caused by their mill.

[23] Additionally, it was contended that there was no evidence led by the plaintiffs to establish the alleged damages they suffered.

This Court's Decision

[24] The plaintiffs' claim was premised on negligence and public nuisance. As such, it was helpful for the court to be first reminded of the elements to be proved by the plaintiffs on each heads of claim. For negligence, it is trite that they are:

(i) that the defendant owed the plaintiff a duty of care;

(ii) that the defendant has breached of that duty of care; and

(iii) that damage was caused to the plaintiff arising from that breach of duty of care.

[25] As for public nuisance, s. 8(1) of the Government Proceedings Act 1956 provides that:

> ... two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such order relief as may be appropriate to the circumstances of the case.

[26] In such a suit, the plaintiff bears the burden of proving that the defendant's acts or omissions caused damage, injury or inconvenience to the plaintiff who is a class of the subjects of the State – see *Majlis Perbandaran Pulau Pinang v. Boey Siew Than & Ors* [1977] CLJU 68; [1977] 1 LNS 68; [1978] 2 MLJ 156.

[27] As to what constitutes "nuisance", the learned authors in *Clark & Lindsell on Torts* (18th edn), London, Sweet & Maxwell, 2000, at p. 979, stated the following:

> It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained of as constituting the nuisance, such as voice, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours ... No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.

The Claims Against The First Defendant

[28] The plaintiffs' claim against the first defendant rested solely on the fact that the first defendant had been charged and convicted for breaching the conditions of the licence issued by the DOE to operate its oil palm mill between the period from 1 July 2018 to 30 June 2019.

[29] It was not in dispute that the first defendant had, prior to the present action and between the years 2003 to 2019, been charged and convicted for seven offences under the Environmental Quality Act 1974 ("the Act"). However, the claim for negligence was premised on the charge in 2019 which was based on the offence committed on 14 February 2019 specifically for discharge of effluents with excessive BOD and suspended solids.

[30] The plaintiffs led evidence through PW2, an officer with the DOE that the DOE had carried out an inspection on the premises of the first defendant's mill on 14 February 2019 and had taken samples which were later shown to contain excessive BOD and suspended solids.

[31] The first plaintiff, PW3 also testified that in around 2019, he discovered that the Long Towie River, a tributary of Sungai Segaliud had been severely polluted, resulting in the river water turning black and oily and fish and shrimp in the river dead. He complained about this to the DOE. A newspaper, Metro Daily carried a report of this matter on 11 February 2019.

[32] Based on the above, it was then submitted by learned counsel for the plaintiffs that it was "highly probable" that the pollution reported on 11 February 2019 was caused by the act of the first defendant in discharging or causing to discharge industrial effluent into Sungai Segaliud and/or its tributaries in particular Sungai Long Towie. This was due to the proximity of the dates between the offence and the newspaper report. The same evidence was relied on to support the plaintiffs' claim for public nuisance.

[33] At the outset, the question which this court needed to consider was, "did the first defendant's acts or omissions giving rise to the conviction for the offence of discharging effluents with excessive BOD and Suspended Solids in turn caused the pollution in the Long Towie River?" The same question would be relevant in considering the plaintiffs' claim for negligence and public nuisance.

[34] Relying on the case of *Petronas Gas Bhd v. DWZ Industries (Johor) Sdn Bhd & Anor* [2020] 2 CLJ 694; [2021] 7 MLJ 283, the first defendant contended that the plaintiffs failed to prove that the first defendant had discharged industrial effluent into Sungai Segaliud and its tributaries and that the said discharge had caused the death of the marine life in Sungai Segaliud and its tributaries.

[35] It was contended for the first defendant that based on the *Petronas Gas* case (*supra*) and in the circumstances of the present case, in order for the plaintiffs to prove that the first defendant had breached their duty of care, the plaintiffs had a two-fold burden to prove:

(i) that the first defendant had discharged industrial effluent into Sungai Segaliud and its tributaries; and

(ii) that the said discharge had caused the death of the marine life in Sungai Segaliud and its tributaries.

[36] When considering the weight to be attached to the undisputed evidence that the first defendant had a conviction for an offence under the Act, this court first had in its mind s. 43 of the Evidence Act 1950 which provides that:

> Judgments, orders or decrees other than those mentioned in sections 40, 41 & 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

[37] In *Hollington v. F Hewthorn & Co Ltd* [1943] 2 All ER 35, the English Court of Appeal had this to say about the admissibility of criminal convictions in civil suits:

> There is one further observation we may make on this part of the case. The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is usually supported on the ground that the facts have been investigated, and the result of the previous investigation is, therefore, at least some evidence of the facts that have been established thereby. To take the present case, it could be said that the conviction shows that the magistrates were satisfied, on the facts before them, that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt; though the discussion by text-book writers and in the cases all turn on the admissibility of convictions, not of acquittals. If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal: and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that was cited in the argument, we are of opinion that, both on principle and authority, the conviction was rightly rejected.

[38] The principle in *Hollington v. F Hewthorn* (*supra*) has been applied with approval in the following cases: *She Eng Gek v. DA De Silva* [1956] CLJU 113; [1956] 1 LNS 113; [1957] 1 MLJ 55; *Ong Tua Chor v. Lee Beng Tong* [1975] CLJU 116; [1975] 1 LNS 116; [1976] 1 MLJ 187; *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300; [1997] 2 MLJ 261; *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22;

Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin [2015] 7 CLJ 59; [2016] 6 MLJ 226 and *Datuk S Nallakaruppan & Ors v. Datuk Seri Anwar Ibrahim & Other Appeals* [2015] 6 CLJ 425; [2015] 4 MLJ 34.

[39] In *Datuk S Nallakaruppan*'s case (*supra*), the plaintiff brought a defamation suit against the defendant in relation to a certain publication. The defendant relied on a remark in the majority judgment of the Federal Court in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737; [2004] 3 MLJ 405 to the effect that there was evidence to show that the plaintiff was involved in homosexual activities. The Court of Appeal stated the following:

> The rationale underlying s. 43 can be gleaned from the statement in *Hollington*'s case (*supra*) which is as follows:
>
> > The court which has to try the claim for damages knew nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover; the issue in the criminal proceeding is not identical with that raised in claim for damages'.

[40] It was clear that the plaintiffs in the present case could not solely rely on the first defendant's previous convictions under the Act – they had to bring independent evidence to support their claims for negligence and public nuisance.

[41] Notwithstanding that, there was evidence that the Long Tawie River had been polluted as reported in the local newspaper, Metro Daily on 11 February 2019, there was in fact no evidence from the plaintiffs that the said pollution was caused by the first defendant.

[42] Even if the plaintiffs had discharged their burden by the evidence that there was pollution caused in February 2019, in my view, the first defendant had shifted the evidential burden back to the plaintiffs (see *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697) when it was led in evidence through the cross-examination of PW3 and PW4 that the first and second defendants were in fact not the only mills located nearby Sungai Segaliud and its tributaries namely LCH and Andom. It certainly did not help the plaintiffs' case when PW4 was asked in cross-examination whether he was aware of the other mills and he said he did not want to know about them (see Q/A 213, NOP).

[43] The plaintiffs' reliance on the fact that the first defendant had breached its licence conditions and was charged did not *ipso facto* prove that they were the one who had caused the river to be in the condition that it was on 11 February 2019. In other words, causation, being an element to prove in a claim for negligence was not made out.

[44] For the same reason, the plaintiffs' reliance on DW1 's admission that the terms and conditions of the first defendant's licence were meant to avoid pollution to the environment including rivers and that if the terms and condition of licence were breached, there was high possibility that the environment especially river could be polluted, was not an evidence that the first defendant did cause the pollution.

[45] In considering this issue, I had also considered the testimony of PW2 who took samples from the first defendant's premises on 14 February 2019. He testified that the charge was not related to discharge of effluent into the river (see Q/A94, NOP).

[46] On the part of the first defendant, DW1 testified that the treated industrial effluent from the first defendant's mill would only be released into the first defendant's land irrigation and eventually settled there only. When cross-examined, DW2 testified that the treated industrial effluent were released into the land irrigation *via* trenches and furrows which were not connected to any rivers.

[47] DW2, in addition, disagreed to the suggestion that any liquid entering the trenches would eventually or naturally flow into watercourse as the first defendant had only utilised about 50% of their trenches and furrows on their land irrigation at that time.

[48] The plaintiffs did not provide this court any reason to not accept the evidence of DW1 and DW2 on their said testimonies save for to contend that their explanations were "inherently improbable" due to the first defendant's repeated failures in complying with their licence. As stated earlier, the breach of the conditions of the licence could not by itself and without more be evidence as the cause of the pollution on 11 February 2019.

[49] In the circumstances, I found that the plaintiffs have not established their case against the first defendant, be it for negligence and or public nuisance, on a balance of probabilities. It was therefore dismissed with costs subject to allocatur.

The Claims Against The Second Defendant

[50] The plaintiffs' case against the second defendant was substantially premised on the fact that a notice of suspension was issued by the DOE to the second defendant on 11 October 2019 as a result of the DOE's investigation on the pollution of Sungai Segaliud on 26 September 2019.

[51] Based on the following, it was submitted that it was "highly probable" that the second defendant had caused the pollution to the Sungai Segaliud on 26 September 2019:

(i) the testimonies of the plaintiffs' witnesses and the documentary evidence such as police report and the letter from the DOE to the Sekong State Assemblyman dated 15 November 2019;

(ii) the investigation of the DOE which found out that a mill located at the upstream of Sungai Segaliud had breached the conditions of its operation licence;

(iii) PW1's evidence referring to the second defendant's mill;

(iv) the notice of suspension of the second defendant for breaching the conditions of its operating licence; and

(v) the DOE's letter which stated that it was raining on 25 September 2019 in the upstream of Sungai Segaliud.

[52] In addition, the plaintiffs also referred to the cross-examination of the second defendant's mill manager, DW3 who agreed that the breach of the second defendant's licence resulted in the outflows of POME from the land irrigation to waterway or "alurair". In addition, DW3 agreed that the river path from the second defendant's land irrigation area to Sungai Kam Cheong subsequently to Sungai Segaliud started from an internal stream within the second defendant's land irrigation which then flowed into Sungai Kam Cheong and subsequently into Sungai Segaliud.

[53] On the part of the second defendant, it was contended that the plaintiffs' reliance on the DOE's suspension notice to substantiate their claim was misconceived as: (i) the suspension notice dated 11 October 2019 was issued arising from a routine check by the DOE and; (ii) the suspension notice was issued requiring the second defendant to increase the capacity of its land irrigation measures including the construction of four additional new ponds, increasing to a total of twelve effluent ponds to enhance the stabilisation and purification capacity of the palm oil mill effluent and as confirmed by PW1 during cross-examination.

[54] It was submitted for the second defendant that the claim for negligence against the second defendant had not been made out as the plaintiffs had failed to establish that the second defendant had discharged industrial effluent into Sungai Segaliud and caused damage to the river, in other words, the causative link between the damage to the river suffered by the plaintiffs with the second defendant's mill operation had not been made out.

[55] The second defendant further submitted that when carrying out their investigation (which resulted in the suspension notice being issued) the DOE did not conclusively find that the second defendant had discharged industrial effluent into Sungai Segaliud. This was because PW2 confirmed that they did not collect any water samples from Sungai Segaliud and there was no evidence to prove that the river was contaminated by industrial effluent. It was also highlighted that in the DOE's letter dated 15 November 2019, it was stated that the cause of the damage to Sungai Segaliud on 26 September 2019 was due to heavy rainfall on 25 September 2019.

[56] In addition, it was further contended by the second defendant that the plaintiffs had not identified the exact location of their residences and their proximity to the second defendant's mill and that the closest river to the second defendant's mill was Sungai Kam Cheong which was 1.75km away from Sungai Segaliud.

[57] Much like the case against the first defendant, the main issue before this court was whether there was evidence that the second defendant had caused the pollution which occurred on 26 September 2019.

[58] Here, the plaintiffs' narratives were that PW3 had complained to the DOE on or around 26 September 2019 about Sungai Segaliud being polluted. This resulted in the DOE issuing the letter dated 15 November 2019 to the Sekong Assemblyman. In that letter, the DOE confirmed that the river had been polluted causing death to the fish and shrimps in the river. The DOE further stated that they suspected the cause to be as follows:

> Hujan yang telah turun di bahagian hulu Sungai Segaliud pada 25 September 2019 yang telah membawa segala kekotoran memasuki Sungai ini dan ditambah pula pada waktu yang sama, keadaan air sungai yang tidak mengalir (stagnant) kerana rivergate/barrage di takat pengambilan air Sungai Segaliud telah ditutup.

[59] The DOE further stated that they had immediately conducted an investigation on all of the mills or sources of the pollution around the Sungai Segaliud basin. As a result of their investigation, the DOE found one mill which had breached the conditions of their licence and which licence was therefore suspended by the DOE.

[60] The evidence showed that the suspension notice was issued to the second defendant on 11 October 2019. It referred to an inspection carried out on 1 October 2019 and identified the following breaches:

> 1.1 Pelanggaran Syarat no. 4 dan no. 9 Jadual Pematuhan JPKSS/12/00345
>
> Pihak tuan telah gagal melupuskan efluen di kawasan pengairan tanah sepertimana ditunjukkan dalam pelan no. BSM/ENVS/001/09 bertajuk "Topographical Plan For Land Irrigation Area" bertarikh Jun 2009. Sebahagian besar kawasan tanah yang diluluskan tidak digunakan lagi menyebabkan tidak lagi mampu menampung efluen yang diterima daripada proses kilang. Ini telah menyebabkan efluen mengalir dan menyebabkan berlaku limpahan ke alur air yang akan memasuki Sungai Segaliud terutamanya pada musim hujan.
>
> 1.2 Perlanggaran Syarat no. 11 Jadual Pematuhan JPKSS/12/00345
>
> Pihak tuan gagal melaksanakan pemantauan prestasi (performance monitoring) yang lengkap bagi operasi system pengolahan efluen;

A 1.3 Perlanggaran Syarat no. 13 Jadual Pematuhan JPKSS/12/00345

Gagal menyediakan sekurang-kurangnya 0.5 meter freeboard bagi struktur loji dan kolam pengolahan bagi mencgah berlaku limpahan efluen; dan

1.4 Perlanggaran Syarat no. 14 Jadual Pematuhan JPKSS/12/00345

B Perlupusan tandan kosong tidak diurus sewajarnya sehingga menyebabkan pencemaran air larut resap akibat timbunan tandan kosong yang tidakk terkawal di Ladang NPC Resources Berhad Estate Division 1 yang telah menyebabkan aduan awam dan berisiko mencemarkan alur air.

C **[61]** Based on the aforementioned matters, contrary to the submissions by the second defendant, there was evidence on a balance of probabilities to show that the second defendant had caused the pollution on 26 September 2019.

[62] Firstly, it was incorrect to say that by the DOE's letter, the DOE had D confirmed that the cause of the damage to Sungai Segaliud on 26 September 2019 was due to heavy rainfall on 25 September 2019. The word used by the DOE was "disyaki" (suspected). Further, if one were to look at the whole of the evidence, it showed that based on the DOE's letter dated 15 November 2019, the department had conducted checks on all of the mills or source of E the pollution around the Sungai Segaliud basin and they found that only the second defendant had breached its licence conditions.

[63] Going by the breaches identified by the DOE in the suspension notice (see para. [60] above), it was clear that the DOE had found that the second defendant had failed to properly discharge its effluent discharge, causing F overflows into the tributaries of Sungai Segaliud and eventually to Sungai Segaliud. In this regards, unlike the case against the first defendant, I was of the view that notwithstanding that there was no sample taken of the water from Sungai Segaliud, the evidence as discussed above was sufficient to require the second defendant to answer.

G **[64]** In addition, while I found that the first defendant had successfully raised the issue that there were other mills nearby Sungai Segaliud, in the case against the second defendant, the DOE had stated that they had checked all of the mills or source of the pollution around the Sungai Segaliud basin thus, singling out the second defendant.

H **[65]** As the law requires, the evidential burden shifted to the second defendant to rebut the plaintiffs' evidence – see *Letchumanan*'s case (*supra*). The second defendant's main contention to dispute the plaintiffs' claim was that their mill was located a distance away from Sungai Segaliud and from Sungai Kam Cheong. The suggestion was that the plaintiffs had not proven I that the second defendant's effluent discharge would have made its way into Sungai Segaliud.

[66] In this regard, this court did not lose sight of the fact that the DOE investigation started off with the complaint by PW3 regarding Sungai Segaliud and following from that, the DOE had conducted their investigation on the sources of pollution around the Sungai Segaliud basin.

[67] Further, para. 1.1 of the suspension notice clearly stated that the second defendant's failure to discharge the effluent properly had caused the effluent to flow into the "alur air" (tributaries) which then flowed into Sungai Segaliud. When cross-examined, PW2, the DOE officer confirmed that Sungai Kam Cheong was a tributary which passed through Sungai Segaliud (Q/A 102, NOP).

[68] If that was not enough, the second defendant's own evidence quite clearly destroyed the second defendant's contention on this issue. DW3, for instance testified that the river path from the second defendant's palm oil mill and land irrigation area to Sungai Kam Cheong started from an internal stream within the second defendant's palm oil mill. He further agreed that the internal stream would flow into Sungai Kam Cheong and that Sungai Kam Cheong would flow into Sungai Segaliud (Q/A 369 – 373, NOP). Significantly, there was no re-examination on his answers.

[69] Based on the above, I found that the second defendant failed to rebut the plaintiffs' evidence and hence, the plaintiffs had established their claim for negligence against the second defendant on a balance of probabilities.

[70] As regards the claim for public nuisance, based on the same evidence above, I also held that the plaintiffs had established their claim on a balance of probabilities.

Orders

[71] The plaintiffs had prayed for the following reliefs in this action (*verbatim*):

> (1) A declaration that the defendants unlawfully and/or wrongfully released and/or discharged or caused to be released or discharged the Industrial effluent and/or other effluent or substance into Sungai Segaliud and/or its tributaries;
>
> (2) An injunction to restraint the defendants, its employees, servants and/or agents from unlawfully releasing and/or discharging or causing to release or discharge Industrial effluent and/or any other effluent or substance into Sungai Segaliud and/or its tributaries;
>
> (3) The losses and damages identified in paragraph 24 above or any other sum which this Honourable Court deems reasonable and proper;
>
> (4) Interest at the rate as this Honourable Court deems fit and proper on

A the sum awarded in item (4) above calculated from the date on which the said sum was due and owing to the plaintiffs until the date of judgment;

(5) General damages to be assessed against the defendants;

(6) Aggravated, exemplary and/or punitive damages to be assessed against the defendants;

B

(7) Interest at the rate of 5% or any other rate as this Honourable Court deems fit and proper on the judgment sum calculated from the date of judgment until final settlement;

(8) Costs; and

C (9) Such further or other relief as this Honourable Court deem fit and proper to grant.

[72] In view of my findings above, I allowed prayer (1) of the amended statement of claim to read as follows:

D A declaration that the second defendant had unlawfully and/or wrongfully released and/or discharged or caused to be released or discharged the Industrial effluent and/or other effluent or substance into Sungai Segaliud and/or its tributaries;

[73] I disallowed prayer (2) as any unlawful release or discharge of effluents are within the purview of the DOE and the Act.

E

[74] As for prayers (3) & (5), firstly, prayer (3) referred to para. 24 of the plaintiffs' amended statement of claim, however, there was no sum stated in para. 24. It was only in submissions that the plaintiffs claimed general damages in the sum of RM50 million. The basis for the said sum was that the second defendant had made an income of approximately RM98 million per year.

F

[75] It must be noted that this court had specifically ordered for the trial to cover both the issues of liability and damages. The plaintiffs, therefore, also bore the burden of establishing the quantum of damages – see *Popular Industries Ltd. v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360. However, the plaintiffs through PW3 and PW4 merely testified that the destruction and pollution had severely affected the lives and livelihoods of the residents of Kampung Segaliud and that rivers were invaluable assets and treasures.

G

H **[76]** That the second defendant had made an income of nearly RM100 million per year was, with respect, not evidence as to the damages suffered by the plaintiffs. That being the case, I was constrained to hold that notwithstanding the positive findings of this court on the issue of liability against the second defendant, there was nothing before this court for the court

I

to justify the claim for RM50 million and or other sum for that matter. In the circumstances, I disallowed prayer (3). As for prayer (5), it was rendered superfluous as the trial was specifically ordered to cover both the issues of liability and damages.

[77] As with prayer (3), I found no evidence which would support the grant of prayer (6). Consequently, prayers (4) and (7) for interests were also disallowed.

[78] I did, however, grant costs to be paid by the second defendant to the plaintiffs subject to allocatur.